RIGHTS OF CITIZENS AND PERSONS

UNDER THE

FOURTEENTH AMENDMENT

BY

CHIN-YUNG YEN

FELLOW OF COLUMBIA UNIVERSITY

Submitted in Partial Fulfilment of the Requirements for the Degree of
Doctor of Philosophy in the Faculty of Political Science
Columbia University

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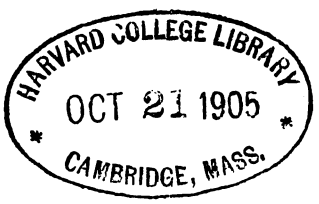

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CHAPTER I.

History of the Amendment.

The rights and immunities of citizens and persons guaranteed by the Fourteenth Amendment cannot be understood apart from the history of its origin. Therefore a study of the events and forces which led to its adoption is necessary. It is impossible, however, in a short monograph like this, to present all that legitimately belongs to such a history, as the whole ground of the Civil War and reconstruction should be covered. Moreover, it is only essential to the purpose of this paper to point out the historical forces and conditions which have an immediate bearing upon the development and adoption of the Amendment.

But before this can be profitably undertaken, the general character of the Amendment must be considered. All agree that the Fourteenth Amendment is a law; but there is a divergence of opinion as to what law is. Some say that law is a rule of conduct, while others maintain that it is the command of a sovereign. Notwithstanding these two views, students do agree that the ethical basis of law is the common consciousness of rights and wrongs. Law, therefore, from this point of view, is the objectification of the common consciousness of rights and wrongs as rules of conduct for the subject or citizen. Now the Fourteenth Amendment is that kind of law which refers chiefly, though not exclusively, to individual immunity against the States of the Union; it is, therefore, the sovereign expression of the common consciousness of the nation in respect to the civil immunity of the citizen and the individual against the powers of the States of the Union.

The consensus of opinion and the principles thus established were the result of a long conflict between the doctrine of the rights of man and slavery. The inner meaning of the Amendment is therefore to be found by an examination both of the legal aspects of slavery and the opposing political philosophy. Slavery was *not, at the time, a* national but a local institution. It was

established by State laws and existed, in 1860, in fifteen out of thirty-one states. An examination of the laws of the slave states discloses the exact status of slavery. The civil code of Louisiana defined a slave as "one who is in the power of his master, to whom he belongs. The master may sell him, dispose of his person, his industry, and his labor: he can do nothing, possess nothing, nor acquire any thing but what must belong to his master."[1] The law of Mississippi provided: "All negro and mulatto slaves, in all courts of judicature in this State, shall be held, taken and adjudged to be personal property."[2] The laws of Georgia provided that "any person who should see more than seven male slaves not in the company of a white person, in a high road, might whip each slave twenty lashes; and that every colored person was presumed to be a slave, unless he could prove himself free"[3] according to the South Carolina statute: "Slaves shall be deemed sold, taken, reputed, and adjudged, in law, to be chattels personal in the hands of their owners and possessors, and their executors, administrators, and assigns, to all intents, construction, and purposes whatever."[4] There were laws in Virginia and other states prohibiting negroes from acquiring knowledge and imposing penalties upon the whites for teaching them. In Maryland, the mulatto was liable to cruel and unusual punishment. In summing up the laws of slavery, Judge Stroud said: "The cardinal principle of slavery — that the slave is not to be ranked among sentient beings, but among things — as an article of property — a chattel personal — obtains as undoubted law in all of these (the Slave) States."[5]

Such, in brief, were the legal conditions of slavery. Now the theory of the opposing doctrine of human rights may be stated. The idea of the rights of man is to be found in most of the speeches of the prominent anti-slavery statesmen; such as Senators Sumner and Trumbull. The former, in speaking on the idea of equality before the law, said: "The language may be new in

[1] "Civil Code of Louisiana," Art. 35.

[2] "Statute Law of Mississippi," 1857, p. 235.

[3] Hotchkiss, "Statute Law of Georgia and State Paper," 814, 826.

[4] *2 Brev. Dig., 229.* Prince's Dig., 446. Thompson, Dig., 183.

[5] *Stroud, "Law of Slavery,"* 22.

apprentices should not leave the employment of the masters without their consent and should be recaptured and punished in case of escape. The vagrant law in Georgia provided that all persons had the right to arrest vagrants and hand them over for trial on the next term of the county court, and that such vagrants, upon conviction, should be either punished or bound out to some person upon such consideration as the court might prescribe.[1] The law in Alabama prohibited any person from interfering with, hiring, employing, or enticing away a servant, or inducing him to leave the service of another before the expiration of the term of service contracted for.[2] Similar vagrant laws were to be found in Florida,[3] Virginia,[4] Louisiana,[5] and other states. The vagrant law of Tennessee was the least oppressive in character among the legislature enactments of the South.

All these measures were attempts to establish a system of modified slavery under the color of State power. They subjected the negroes to severer punishment than the whites and conferred upon them fewer exemptions. Some of the very restrictions which had been imposed upon them in slavery were still attached to them; and some of the very exemptions which constituted the status of citizenship were denied them.

Such legislative enactments were necessarily short-lived. They only served to call the attention of the Congress of the United States to the need of an immediate enforcement of the Thirteenth Amendment. Following the extinction of the Freedmen's Bureau, Senator Trumbull introduced a bill, which was substantially like the preceding ones of Wilson and Sumner. This bill was passed over the President's veto, in the Senate, on the sixteenth of April, 1866, by a vote of thirty-three to fifteen; and, in the House on the ninth, by a vote of one hundred and twenty-two to forty-one. A hot debate on the constitutionality of this bill, known as The Civil Rights Act, arose in Congress. Friends of the bill maintained that

[1] McPherson, "Reconstruction," p. 33.
[2] *Ibid.*, p. 34.
[3] *Ibid.*, p. 39.
[4] *Ibid.*, p. 41.
[5] *Ibid., p. 44.*

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abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the House, Mr. Bingham was asked the meaning of the phrase 'due process of law,' to which he answered: "The courts have settled that long ago and the gentleman can go and read their decisions."[1] Mr. Hale inquired whether this resolution, if adopted, conferred upon Congress general powers of legislation in regard to the protection of life, liberty, and property. Mr. Bingham replied: "It certainly does this; it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons."[2] Then he continued: "The words equal protection of the laws contain it and nothing else."[3]

When the Senate proceeded to consider this resolution, Senator Howard offered the following amendment: "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States."[4] Senator Doolittle moved to insert "excluding Indians not taxed."[5] Senator Howard rejected this, saying: "Indians born within the limits of the United States who maintain their tribal relation, are not in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been, in our legislation and jurisdiction, as being quasi foreign nations."[6] The amendment, which Howard offered as declaratory of the supreme law of the land, was taken from the opening section of the Civil Rights Act.

On the thirteenth of June, 1866, Chairman Stevens presented the amended resolution to the House and insisted on its adoption. The amended resolution was then read by the secretary; the question of concurrence put before the House; and a vote taken, resulting in 120 yeas and 32 nays, while 32 refrained from

[1] *Cong. Globe*, 1st sess. 39th, p. 1088.
[2] *Ibid.*, p. 1094.
[3] *Ibid.*, p. 1094.
[4] *Cong. Globe*, 1st sess. 39th, p. 2869.
[5] *Ibid.*, p. 2890.
[6] *Ibid., p. 2890.*

voting.[1] On the sixteenth of June, this resolution was officially presented to the Secretary of State with an instruction to transmit certified copies to the governors of the several states to be laid by them before the legislatures for ratification.

The omission of submitting this resolution to the President for his approval provoked a message from Johnson questioning the validity of the Congressional proceedings. "Even in ordinary times," said he, "any question of amending the Constitution must be justly regarded as of paramount importance. This importance is at the present time enhanced by the fact that the joint resolution was not submitted to the two Houses for the approval of the President, and that of the thirty-six States which constitute the Union eleven are excluded from representation in either House of Congress, although, with the single exception of Texas, they have been entirely restored to all their functions as states in conformity with the organic law of the land, and have appeared at the national capital by Senators and Representatives, who have applied for and have been refused admission to the vacant seats." Then he added with regard to the action of the Secretary of State in transmitting the amendment to the State Executives: "I deem it proper to observe that the steps taken by the Secretary of State, as detailed in the accompanying report, are to be considered as purely ministerial, and in no sense whatever committing the executive to an approval or recommendation of the Amendment to the State Legislatures or to the people."[2]

The resolution was duly ratified by Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, and Michigan; but rejected by Georgia, North Carolina, Florida, Alabama, Arkansas, South Carolina, Delaware, and Maryland; and ignored by Louisiana and Texas. But the States of the South were forced to adopt it by the first reconstruction act. Congress, on the twenty-first of July, 1688, passed a joint resolution reciting the ratification of the amendment, declaring it a part of

[1] *Cong. Globe*, 1st sess. 39th, p. 3149.

[2] *Cong. Globe*, 1st sess. 39th, pp. 3356-3357.

the Constitution, and directing its promulgation. The amendment as adopted, read thus: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Thus the common consciousness of rights and wrongs with reference to civil liberty against States was enacted into fundamental law.

CHAPTER II.

Citizens and Persons.

The first section of the Fourteenth Amendment opens with a partial definition of citizenship. Citizenship, broadly speaking, means simply membership in a state. The United States, from the time of the Confederation of 1781 down to 1787, was not, from the point of view of Constitutional Law, one state but several states. Owing to the existence of several states instead of one, there was not and could not have been citizenship of the United States except incidentally in the period which has been termed, "The Confederate Period," of American history. A reflection upon the political system then existing confirms this fact. The political science upon which the Articles of Confederation rested was thoroughly confederate. It recognized the sovereignty of each State. It denied the existence of a national sovereign power. The character of the central government then created was weak; it could advise but not command. The requisitions put upon them by the Congress were as to execution left entirely to the respective States. The articles then framed constituted a compact, containing neither effective provisions for the organization of the sovereignty nor for civil liberty. Each State was a state in fact as well as theory. What really did exist in the Confederate Period was, as objective institutions, thirteen states, thirteen local governments, and one central government.[1] Consequently, there could have been citizenship of the thirteen states, but not immediately of the United States.

In view of the rudimentary state of political science at that time, the true character of the political system was not comprehended; therefore, the question whether the citizens owed immediate allegiance to the respective States or to the central government of the Confederation was indeed a topic of discussion. This discussion, however, has a historical interest rather than practical importance so far as the topic in hand is concerned.

[1] J. W. *Burgess*, "*Pol. Sci.* and Comp. Const. Law," Vol. I, p. 101.

The Articles of Confederation were practically ignored in the National Convention which met in 1787. A new constitution, resting upon sound political science, was formed. It provided a system of federal government, not a system of confederated states. It ignored the sovereignty and independence of the several states. It provided through the Constitution the legal means for the organization of the state Sovereignty binding upon every State, every individual subject, as well as all associations of subjects. In a word, it recognized one state and one only.

The formation of one state from thirteen produced a change in the allegiance of the citizens of the several states. Before the formation, the individual derived his citizenship with its immunities and rights, if there were any, from the States. Now he derives his citizenship with all its immunities and rights from the state, the United States. It is from the United States, not the former several States, nor the government of the United States nor the local governments of the several States that he has his citizenship. That such is the fact is clearly shown by the article of the Constitution in relation to treason. Therefore, the bond which connects citizens with the body politic is not the States but the state, the United States.

Although the constitution, prior to the adoption of the Fourteenth Amendment, nowhere in express terms defined the status of citizenship of the United States, yet it did assume its existence and provide for some necessary consequences that flowed from the citizen's relation to the United States government; for instance, it declared citizenship as a qualification for membership of both houses of Congress,[1] it provided that only natural-born citizens or citizens at the time of the adoption of the Constitution were eligible to the office of President[2]; it granted to the Congress the power of making laws for naturalization[3] and it imposed certain duties and obligations upon the citizen.[4]

A careful examination of these constitutional provisions reveals the fact that there were, prior to the adoption of the Fourteenth

[1] Art. I, Sect. 2, U. S. Constitution.
[2] Art. II, Sect. 1, U. S. Constitution.
[3] *Art. I, Sect. 8, U. S.* Constitution.
[4] *Art. III, Sect. 3,* U. S. Constitution.

Amendment, two kinds of citizens; namely, natural-born and naturalized. The conditions which should constitute a naturalized citizen were to be entirely determined by the Congress under the clause: "Congress has power to establish an uniform rule of naturalization."[1] There was therefore, no difficulty in interpreting the term naturalized citizen. But who were natural-born citizens? What legal implications were involved in the term "natural-born"? Certainly the Constitution did not offer any answer, nor did it give any specific power to the Congress to make laws settling these questions. Owing to these circumstances, the term "natural-born" must be interpreted either in the light of the common law or of political philosophy.

Aristotle was the first great writer who defined it. A citizen, said Aristotle, is one to whom belongs the right of taking part in both the deliberative and judicial proceedings of the community of which he is a member.[2] Thus, in his opinion, those who have the right of participation in both the legislative and judicial proceedings of the community are citizens; and those who have not such rights, as women and children, are not citizens. An interpretation of the term according to Aristotle's definition is not admissible in the jurisprudence of the United States.

The term must, therefore, remain governed by common law; and in the case of Lynch *v.* Clark,[3] the Court maintained this view. The defendant was declared to be a citizen of the United States by virtue of her birth within the jurisdiction of the United States. However, in the famous case of Scott *v.* Sanford.[4] Chief Justice Taney and Justice Curtis both delivered opinions in which the limitations of the common law were not recognized. Chief Justice Taney gave the term "natural-born" citizen a different interpretation from that of the Lynch case. He held that natural-born citizens of the United States meant those who were descended from a superior class of beings, the actual holders of civil rights at the time of the establishment of the Constitution, while those, who

[1] Art. I, Sect. 8, U. S. Constitution.
[2] Welldon, "The Politics of Aristotle," p. 101.
[3] 1 Sandford's Ch. R., 584, 639.
[4] 19 Howard 393.

were born in the United States of a subordinate and inferior class of beings subjected by the superior race, whether emancipated from slavery or not, were subjects only. Thus, in the Chief Justice's opinion, there were two classes of natural-born persons in the United States and one of them was not admitted to citizenship. Justice Curtis, while dissenting from the Chief Justice, argued in this way: "Every free person born on the soil of a State, who is a citizen of that State by force of its constitution or laws is also a citizen of the United States" and "Among the powers unquestionably possessed by the several States was that of determining what person should and what person should not be citizens. It was not practicable to confer on the government of the union this entire power. What it embraced may be divided into three parts: First, the power to remove the disabilities of alienage either by special acts in reference to each case, or by establishing a rule of naturalization to be administered and applied by the Courts; Second, determining what persons should enjoy the privileges of citizenship in respect to the internal affairs of the several states; Third, what native-born persons should be citizens of the United States." Every citizen whether born or naturalized was thus primarily a citizen of some State. This theory of the status of United States citizenship was exactly the same as that of Mr. Calhoun, who, in one of his speeches, said: "Every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States."[1] In other words, both Mr. Calhoun and Mr. Curtis held the theory that each State of the Union could make or unmake the status of United States citizenship, because all individuals who were citizens of the United States had derived their citizenship from their respective States and not the United States. The doctrine of the *jus soli* was, therefore, in their opinions, not the essential criterion for determination of citizenship. This theory, as well as the decision of the Court of the United States, was entirely supplanted by the Civil Rights Act of April 9, 1866, and the Fourteenth Amendment to the Constitution.

[1] "*The Works of* Calhoun," p. 243.

Though the Civil Rights Act and the Fourteenth Amendment were passed practically for the same purpose, yet the definition of citizenship in the former is not the same as in the latter. Indeed, the definitions are not only different in phraseology but in meaning also; and not only different in meaning but, to a certain extent, contradictory. The Civil Rights Act defines the word citizen as follows: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed."[1] But the definition contained in the Fourteenth Amendment reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State in which they reside."[2] The Civil Rights Act thus exempts from its operation all diplomats because, by international practice, all sovereigns, ambassadors, ministers, foreign envoys, consuls with diplomatic character, and their respective households, are recognized as carrying their own nationality with them and are not subject to foreign jurisdiction. Again, it exempts from the operation of the *jus soli* Indians not taxed as well as all children born to a foreigner during the hostile occupation of any part of the United States. Finally, it exempts from its operation all persons born in the United States subject to any foreign jurisdiction.

The exemptions of the Civil Rights Act, however, are not to be found in the Fourteenth Amendment to the Constitution. The meanings of the words contained in it are not defined and must, therefore, be interpreted in the light of the English common law, because this is also the common law of the United States. The common law theory with regard to citizenship is the theory of *jus soli*. Mr. Cockburn stated this theory on nationality as follows: "Every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents are settled, or merely temporarily sojourning in the country, is an English subject, save only the children of foreign ambassadors (who are excepted because their fathers carry their own nationality with them) or a child born to a foreigner during the hostile occupation of any part of the terri-

[1] "U. S. Statute at Large," Vol. 14, p. 27.

[2] *Const. Amendment, Art.* 14, Sect. I.

tory of England."[1] The Fourteenth Amendment, which is simply intended to declare that the English common law shall be the law of the United States, is then clearly full of exceptions. It exempts from its operation all the diplomats, their families and servants, and all children born to foreigners in any part of the United States under occupation by the hostile force, together with the Indians who are not regarded as subject to the jurisdiction of the United States, but as subject to an organized tribe recognized by the government of the United States.[2] However, it allows its operation on persons who are born in and are subject to the jurisdiction of the United States without regard to the question of their subjection to any foreign jurisdiction. This the Civil Rights Act probably forbids, because it exempts from its operation all persons born subject to any foreign jurisdiction. The Civil Rights Act requires three elements to constitute the status of citizenship of the United States; namely, the element of birth, the element of subjection to the jurisdiction of the United States and the element of freedom from any foreign jurisdiction. The Fourteenth Amendment, however, requires only two; the element of birth and the element of subjection to the United States' jurisdiction. From this it will be seen that the main difference between the two lies in the element of relation to foreign jurisdiction, though they both agree in exempting from their operations all diplomats, their families and servants, Indians, and children born to a member of a foreign force during hostile occupation. In the case of Wong Kim Ark, the Court overruled the Civil Rights Act.[3] Wong Kim Ark was born of parents of Chinese decent, subjects of the Emperor of China, though domiciled at San Francisco. He was not, according to this Civil Rights Act, a citizen of the United States because he had possessed only two requirements for that status — the element of birth and the element of subjection to the jurisdiction of the country. The third element — freedom from any foreign jurisdiction — was entirely absent; for he could not be regarded in the intent of the Civil Rights Act as free from

[1] Cockburn, "Nationality," p. 7.
[2] *Elk v. Wilkins*, 112, U. S. Reports, 94.
[3] *Wong Kim Ark*, 169, U. S. Reports, 649

the jurisdiction of China.[1] That a constitutional provision should override an act in whatever particulars they may differ is without doubt a sound rule of jurisprudence. The decision in the case of Wong Kim Ark not only overruled the Civil Rights Act, but practically settled the whole question of natural-born citizenship of the United States. Natural-born citizens, according to this decision, are those persons who are born in the United States and subject to the jurisdiction thereof, without regard to the nationality of their parents. Persons who possess the element of birth in the country and the element of subjection to the United States at the time of their birth are natural-born citizens.

Besides the class of natural-born citizens, there is another class of persons who are born abroad and are yet citizens of the United States. The principle of the common law is that, when a person is born beyond the jurisdiction of a state, he does not by the mere fact of his birth owe any allegiance to that state and is therefore not a natural-born citizen.[2] In the United States, this common law principle was modified by the Act of February 10, 1855.[3] The theory of *jure sanguinis* was brought into practice, and it has since remained a part of the United States' jurisprudence. However, it should be noticed that the right of citizenship is limited to one generation and does not descend to persons whose fathers have never resided within the United States; nor does it extend to children born abroad of naturalized citizens of the United States continuing to reside abroad.[4] It does extend, however, to children born in the United States of naturalized citizens of the United States after their renunciation of citizenship,[5] and to children born on an American vessel.[6] This class of citizens is not considered to be natural-born but naturalized, because they derive their citizenship through an act of Congress and not through the constitutional clause "natural-born citizen," which, as we have seen, is interpreted by the court in the light of the English common

[1] The case of Francors Heinreich, "U. S. For. Rel. 1872," p. 172.
[2] Dicey, "Conflict of Laws," p. 178.
[3] Rev. Stat., 1993.
[4] Embdon's Case, 2 Wharton's Digest, p. 410.
[5] 2 Wharton's Digest, p. 412.
[6] U. S. *v.* Gordon, 5 Blatchf. 18.

law; *i. e.*, the *jus soli*. They cannot be eligible to the office of President.[1] They cannot enjoy the full privileges of citizenship, for they are not protected, when they are under age, against the state in whose territory they were born, if the state claims them as *jus soli* citizens.[2]

Having discussed citizenship obtained by birth, it is necessary to devote some attention to that obtained by naturalization. The power of naturalization is expressly granted by the states to the Congress through the Constitution, under the clause "Congress shall have the power to establish a uniform rule of naturalization."[3] The meaning of this term, according to the case of Boyd *v.* Thayer, is the "act of adopting a foreigner and clothing him with the privileges of a native citizen."[4] The entire clause, if the definition of naturalization be inserted, reads as follows: Congress shall have the power to establish a uniform rule of adopting foreigners and clothing them with the privileges of native citizens. A naturalized citizen does not, however, have all the privileges of a native. He is not eligible to the presidency.

The power of naturalization, like the powers of regulating commerce and the monetary system, is an exclusive power. The States cannot interfere in its exercise. They cannot change or alter the rules of naturalization which Congress has established. They cannot claim, by the mere fact of ability to confer on foreigners all the rights and privileges of citizenship within their own boundaries, the right to naturalize any aliens. One who has been clothed with such privileges is still an alien in the eyes of the constitutional law of the United States.[5] In short, naturalization can be effected only by Congress.

Congress has exercised this power in two ways: (1) by individual naturalization; (2) by collective naturalization. Individual naturalization may be effected either by proceedings under

[1] Art. II, Sect. I, U. S. Constitution.

[2] Steinkauler's Case, 15 Op. Att'y-Genl. 15; 2 Wharton's International Law Digest, s. 184.

[3] Art. I, Sect. 8, U. S. Constitution.

[4] Boyd *v.* Thayer, 143, U. S. Reports, 135.

[5] Dred Scott *v.* Standford, 19 Howard, 393, 405. Slaughter House Case, 16 *Wall, 36, 73. Boyd v.* Nebraska, 143 U. S. Reports, 132,169.

general laws or by special laws. Collective naturalization may be effected either by treaties or by statutes. In these ways only may naturalized citizenship of the United States be attained.

A citizen of the United States, by individual naturalization through the proceedings under general laws, must have fulfilled the requirements of the Act passed on April 14, 1802,[1] which consists of:

1. A preliminary declaration three years before admission is to be attained. (But the Act of 1824 reduces this period to two years.)[2]

2. He must satisfy the courts by other proof than his own oath, *i. e.*, by the oath or affirmation of at least two citizens of the United States, that he has resided five years at least in the United States, and one year at least within the State where the Court is held.

3. He must prove himself during that time to be of good moral character and to be loyal to the principles of the Constitution of the United States.

4. He must renounce any title or order of nobility, if he has any.

5. He must declare on oath or affirmation that he will support the Constitution of the United States and abjure his prior allegiance.

6. He must be naturalized at the time when his original country is not at war with the United States.

If he is a citizen by individual naturalization through special laws, he must derive his citizenship either under Section 4 of the Act of April 14, 1802,[3] or the Act of May 26, 1824,[4] or that of July 17, 1862,[5] or that of July 26, 1894,[6] or the Act relating to married women.[7] All these acts are special creations for clothing a certain class of individuals with the immunities and privileges of United States citizens. The Fourth Section of the

[1] "Statute at Large," v. 2, p. 152.
[2] "Statute at Large," v. 4, p. 69.
[3] "Statute at Large," v. 2, p. 155.
[4] "Rev. Stat.," 2d ed., p. 379, Sect. 2167.
[5] "Rev. Stat.," 2d ed., p. 379, Sect. 2165.
[6] "Statute at Large," v. 28, p. 124.
[7] "Rev. Stat.," 2d ed., Sect. 1994.

Act of April 14, 1802, declares that the widow and children of any alien who shall have died after his declaration and before his actual admission as a citizen, shall be citizens of the United States. The Act of May 26, 1824, is a special act for aliens who are under maturity or who have been in the United States some time before their maturity. It declares that any alien, being under the age of twenty-one, who has resided in the United States three years next preceding his arrival at that age, and who has continued to reside therein to the time he may make application to be admitted as a citizen thereof, may after he arrives at the age of twenty-one, and after he has resided five years within the United States, including the three years of his minority, be admitted as a citizen of the United States without having made the declaration required in the first condition of Section 2165, but he must fulfill the other requirements. The Act of July 17, 1862 is a special act for any alien of the age of twenty-one years and upward who has enlisted, or may enlist, in the armies of the United States, either in regular or volunteer forces, and has been or may be hereafter honorably discharged. Such person shall be admitted to citizenship upon his petition, without any previous declaration of his intention to become such. He is not required to prove more than one year's residence within the United States previous to his application; but the Court shall be satisfied by competent proof of such person's honorable discharge from the service of the United States. The Act of July 26, 1894, is a special creation for the navy and the marine corps, the character of the act being very nearly the same as that of July 17, 1862. It grants to any alien who has enlisted or who may enlist in the navy or marine corps of the United States and has served five consecutive years with an honorable discharge, the right to become a citizen without the requirement of any previous declaration or intention to become such. The requirement of this declaration is also relaxed in the case of seamen on American vessels.[1] The act for married women is simply a creation for granting citizenship to any woman who is now or may hereafter be married to a citizen of the United States, pro-

[1] *"Stat. at Large,"* v. 17, p. 268. Act of June 7, 1872.

vided she may herself be lawfully naturalized. The clause "who might herself be naturalized" under the existing law only limits the application to free white women.[1] If such women choose to reside outside of the United States, they are still citizens.[2] However, if any woman marries any foreigner and resides out of the United States, she is considered by the attorney-general not to be a United States citizen.[3]

A citizen by collective naturalization through statutes must show that he has been an inhabitant of a territory before its admission into the Union, or else a citizen of a foreign state before its entrance into the Union. By the admission of Louisiana into the Union, all the citizens of the former republic became, without any express declaration, citizens of the United States.[4] The same thing occurred in the case of the annexation of Texas. An Indian must show that he has obtained his citizenship either through the statute of March 3, 1842,[5] or any of those acts from 1870 onward. The Act of Congress, approved February 8, 1887, provides that any *jus soli* Indian to whom an allotment has been made, who has voluntarily taken up his residence separate from any tribe and has adopted the habit of civilized life, is a citizen of the United States.[6]

Any person is a citizen of the United States by collective naturalization also through treaties, if he can show that he derives his citizenship either from Jay's treaty,[7] the treaty of Paris,[8] the treaty with Mexico in 1848,[9] the treaty with Spain in 1819,[10] or any other treaty that may exist. In the case of Indians, express treaties must also be rested upon. Such is the status of the naturalized citizens of the United States.[11]

[1] Kelly *v.* Owen, 7 Wall, 496.
[2] 14 "Op. Att. Gen.," p. 402.
[3] 13 "Op. Att. Gen.," p. 128.
[4] Debois' Case, 2 Martin, 185.
[5] 5 "Stat. at Large," 101 and 647.
[6] 24 "Stat. at Large," 388.
[7] 8 "Stat. at Large," 116–117.
[8] Dred Scott's Case, 19 Howard, 393, 525. Debois' Case, 2 Martin, 185. 8 "Stat. at Large," 200–202.
[9] 9 "Stat. at Large," 930.
[10] 8 *"Stat. at Large," 256.* 14 "Stat. at Large," 794–796.
[11] 15 *"Stat. at Large,"* 513, 532, 533, 637.

With the recent expansion of the United States, another difficulty is being forced in the determination of questions of citizenship. These are of the greatest importance because the status of citizenship of thousands of people is involved. It raises uncertainties as to the civil liberty of the Peninsulars who decided not to preserve their allegiance to Spain and of the whole number of native inhabitants of the islands of Porto Rico and the Philippines. At the very outset, the question must be asked whether those Peninsulars are citizens of the United States or aliens, and if not either, what is their exact status?

The solution of that part of the question pertaining to the Peninsulars depends upon the meaning of the word nationality contained in the treaty of 1898 between the United States and Spain. Article 9 of the Treaty of Paris of April 11, 1899, provided that: "Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either of them all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce or professions being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the crown of Spain by making, before the Court of Record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have adopted the nationality of the territory in which they may reside."

Therefore, by treaty stipulation, Peninsulars, not formally declaring their intention to preserve Spanish allegiance "shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside." This is so held by the court.[1] The exact interpretation of the word nationality in the stipulation is not clearly settled. There are two general meanings of the term. In the first place, it is used in an ethnical sense, relating to a people united by a common language or a

[1] *192 U. S. Reports 1, 10.*

supposed common blood; in the second place, it means the legal attributes of a member of a state. By international practice, treaty stipulations always follow the legal meanings of the words used. Consequently, we have here nothing to do with the first meaning of the word nationality. One must, therefore, turn to the second meaning, but here another difficulty is encountered. The legal attributes of a person do not decisively fix his citizenship. A citizen of one country may have many of the legal attributes of citizens of another country and yet retain his original allegiance. Seamen, for instance, have certain legal attributes of citizens of the country to which the vessel belongs. The word nationality, therefore, used in the legal sense, leaves an opportunity for the court to determine whether citizenship accompanies the legal attributes. Thus we do not know whether the Peninsulars are citizens; all that we do know is that they are not foreigners but individuals possessing the nationality of the United States.

By the treaty of April 11, 1899, Porto Rico and the Philippines were ceded to the United States by Spain, ceasing to be Spanish territory under the Spanish flag. They are now foreign countries in the eye of the Spanish law; subject to the sovereignty and jurisdiction of the United States alone. According to the law of the United States, they are not foreign but domestic territories.[1] Such is the status in International Law of Porto Rico and the Philippines. Now let us see how many classes of natives there are in these two territories. The term "natives" excludes the aliens and applies only to those native-born persons whose parents are citizens thereof. There are two classes of such natives; namely, those born prior to the Treaty of Cession of April 11, 1899, who may be called the *ante nati;* and those born subsequently to the ratification of the said treaty, who may be called the *post nati.* The *post nati* are persons born in United States territory and subject to the jurisdiction thereof, and therefore possess the requirements of the Fourteenth Amendment to the Constitution. They are, therefore, natural-born citizens of the United States and their status is easily determined. The real

[1] De Lima *v.* Bidwell, 182 U. S. Reports 1.

difficulty lies in the question of the status of the *ante nati* persons. Are they aliens? The Circuit Court of the United States for the Southern District of New York, in the Isabella Gonzalez case, gave an affirmative answer. Isabella Gonzalez, a native-born inhabitant of Porto Rico, was detained at the port of New York and threatened with re-transportation. This immigrant secured a writ of habeas corpus and was brought before the above court, which dismissed the writ and remanded the petitioner to be returned to Porto Rico, on the ground that, as a native of that place, she was an alien and amenable to the immigration law. This decision was based upon the opinion that *ante nati* persons of Porto Rico were alien prior to the ratification of the treaty of cession; and that as aliens, they could only become citizens of the United States by naturalization. Congress, having passed no law to naturalize the inhabitants of Porto Rico, the petitioner, Isabella Gonzalez, remained an alien. This opinion was overruled, however, by Chief Justice Fuller of the Supreme Court of the United States on the appeal of the immigrant. This Court said: "By the constitution of the Spanish monarchy, and the Spanish Civil Code, in force in Porto Rico when the treaty was proclaimed, persons born in Spanish territory were declared to be Spaniards, but Porto Ricans who were not natives of the Peninsula, remaining in Porto Rico, could not, according to the terms of the treaty, elect to retain their allegiance to Spain. By the cession of their territory, their allegiance became due to the United States which was in possession and had assumed the government, and they became entitled to its protection" and "Gonzalez was not a passenger from a foreign port, and was a passenger 'from territory or other place' subject to the jurisdiction of the United States."[1] Thus the Court denies that the *ante nati* persons are aliens; but just what their status is the Court has not yet decided. Therefore, it is still an open question whether they are citizens of the United States.

Last of all arises the question whether the word citizen denotes the same thing as the word person. In the case of Yick Wo *v.* Hopkins, the Court defines the word person to be a man, whether citizen or alien, without regard to race, color, or nationality;[2] but

[1] *192 U. S. Reports* 1, 9, 16.
[2] *118 U. S. Reports* 356.

in the case of the Pembina Mining Company *v.* Pennsylvania, it defines the term person so as to include a corporation legally existing within the commonwealth.[1] Thus the word might mean citizen or human being, as well as a corporation. From these decisions, it is apparent that a citizen is a person but a person is not necessarily a citizen.

[1] 125 U. S. Reports 181.

CHAPTER III.

The State.

The Constitution contains certain limitations on the action of the State. The legal attributes of the term "State" must therefore be understood. As the word state is a political term, one turns naturally to political science for its interpretation. Here we find a great divergence of views. According to Bluntschli, a state is the politically organized natural person of a definite country. Holland defines a state as a numerous assemblage of human beings among whom the will of the majority or of an ascertainable class of persons, is, by the strength of such a majority or class, made to prevail against the number who oppose it. The weakness of Holland's concept is that it gives us no clear cut distinction between the idea of a state and that of other kinds of organizations. The will of the majority or of a class of persons prevailing against opponents is not the main characteristic of a state nor peculiar to it. It exists, almost without exception, in every form of organization, whether it be a church, social club, or industrial corporation. By parity of reason, the weakness of the territorial concept of the word state is apparent. A savage tribe sometimes has territory, as well as a local community; yet no one would call either a state.

The essence of the concept of the word state is, according to Lasson and Burgess, sovereignty. The former defines the state as a "community of men which possesses an organized authority as the highest source of all force";[1] while the latter defines it as "a particular portion of mankind viewed as an organized unit."[2] The characteristic of such organization is, according to him, sovereignty. By the word sovereignty, Prof. Burgess means the original, unlimited power to command and enforce obedience by punishment.

Measured by the concept of the term state in political science,

[1] "System der Rechtsphilosophie," p. 283.

[2] "*Pol. Sci. and Const. Law*," Vol. I, p. 51.

it is evident that the word employed in the Fourteenth Amendment does not mean the same thing. We may, therefore, proceed to an examination of the Constitution itself to determine the significance of this word. The word State, in the first place, designates a territorial division of the United States. This is shown in the requirements that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, that the trial of crimes shall be held within the State where committed, and that the judicial power shall extend to all cases between citizens of different States and between citizens of the same State claiming land under grants of different States. Secondly, it designates the people of the several local communities as distinguished from their governments. The word used in this sense is found in the clause in which the United States guarantees to every State in the Union a republican form of government. Thirdly, it refers to a combined idea of people, territory, and government, as in the clause which imposes conditions upon the States in respect to the formation of new States within the jurisdiction of any other State.

Thus the word State employed in the Constitution itself might designate territorial division, or might denote people, or a local body politic. The last sense of the word is most frequently intended; but none of these designations aids materially in the construction of the Fourteenth Amendment. To interpret it in the light of the first definition, the Amendment has no meaning. According to the second, it amounts to a declaration. The third designation is itself an uncertain expression. In defining the word State in the Fourteenth Amendment, the court has not followed any one of these definitions, although it has used one of them in the interpretation of the word State in other constitutional provisions.[1] "The Prohibition," says Mr. Justice Strong in Ex parte Virginia, "of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative or judicial." Therefore the word State "must mean that no agency of the State or of the officers or

[1] *Hepburn v. Ellzay*, 2 Cranch, 452; Texas v. White, 7 Wallace, 721.

agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."[1] This interpretation of the word State is followed in Scott *v.* McNeal[2] and Yick Wo *v.* Hopkins.[3] The former was a case involving the judgment of the highest court of a State; and the latter was one involving discriminations by executive officers of a municipality of a State. But in Arrowsmith *v.* Harmoning, there is a tendency to narrow the meaning of the word State, as it was held that "a State cannot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The legislature of a State performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection."[4] That is, the word State is made to designate the legislature of a State. Such an interpretation is not well founded. The Constitution says: "No State shall make or enforce any law." Should it say: "No State shall make any law" and nothing more, the Chief Justice's interpretation would be more nearly correct. But the Constitution adds: "No State shall enforce." Now laws are enforced by the courts, or the executives, or the agents authorized to exercise governmental power. This being true, reasoning in this instance, is deficient.

[1] 100 U. S. Reports 339, 346, 347.
[2] 154 U. S. Reports 34.
[3] 118 U. S. Reports 356.
[4] 118 U. S. Reports 194, 196.

CHAPTER IV.

Privileges or Immunities.

The privileges or immunities contained in the Constitution before the adoption of the Fourteenth Amendment were as follows: (1) For the protection of individual rights, the United States Government could not pass a bill of attainder, or *ex post facto* law, issue general warrants of search or arrest, suspend the writ of habeas corpus except in time of war or public danger, require excessive bail, delay any trial unreasonably, try by non-jury process or indict otherwise than by grand jury, define the word treason otherwise than it is defined in the Constitution itself, prevent anyone from keeping or bearing arms, violate the freedom of religion, speech, and press, or suppress peaceable assembly to petition for a redress of grievances; (2) for the protection of property rights, the United States government, when exercising the powers of eminent domain and taxation, could not follow any other process than that laid down by the constitutional provision. As a further security to individual rights, the States could not pass bills of attainder, *ex post facto* laws, or laws impairing the obligation of contract. They could not lay duties on imports or exports except those necessary for executing the inspection laws, or establish legal tender so as to create an appreciation or depreciation of the value of money. Finally, neither the State nor the Federal governments could prevent the citizen from enjoying the equality of rights within the several States under the clause that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The terms, privileges and immunities, in this clause were interpreted by Judge Washington in the case of Corfield *v.* Coryell[1] to comprehend "protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for

[1] 4 *Washington's Circuit* Court Rep., 380.

the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of habeas corpus, to institute and maintain actions of any kind in the Courts of the State, to take, hold, and dispose of property, real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised."

Such were the privileges or immunities of citizens of the United States granted by the original Constitution before the adoption of the Fourteenth Amendment. What are, then, the privileges or immunities secured under the Fourteenth Amendment? The terms, privileges or immunities are not defined; they must remain governed by the debates of Congress; for debates have been declared by the court to be "valuable as contemporaneous opinions of jurists and statesmen upon the meaning of the words themselves."[1] The meaning of these two words is clearly put forth in a speech by Mr. Howard. Discussing the phrase privilege or immunity, he first quoted at length the interpretation expounded by Judge Washington on the case of Corfield *v.* Coryell,[2] of the words in the constitutional clause which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Then he continued: "To these privileges and immunities, whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — to these should be added the personal rights guaranteed and secured by the first eight amendments to the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances — a right appertaining to each

[1] *U. S. v. Wong* Kim Ark, 169 U. S. Reports 649, 699.
[2] *4 Washington's* Circuit Court Rep., 380.

and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and the right to be secured against excessive bail and against cruel and unusual punishment."[1] Thus the terms, privileges and immunities, according to Mr. Howard, are composed of two things; namely, those rights secured by the second section of the fourth article of the Constitution and those conferred by the first eight amendments.

The meaning of the terms, privileges and immunities, above referred to, is entirely constructed on the basis of Congressional debates; but it has been declared by the Court that "the debates in Congress are not admissible as evidence to control the meaning of"[2] words. Admitting this to be justifiable, let us now get the meaning of the terms, privilege and immunity, in the light of the law previously established; namely, the Civil Rights Act. The provisions of this act and the opinion of Judge Washington bear a close relation to each other. The Civil Rights Act declares that a citizen has the power "to make and enforce contracts, to sue, be parties and give evidence." This corresponds to the clause in the opinion of Mr. Washington "to institute and maintain actions of any kind in the Courts of the State." Again, the Civil Rights Act gives the citizen the right "to inherit, purchase, lease, sell, hold and convey real and personal property." This is similar to the clause in the opinion which maintains the right "to take, hold, and dispose of property either real or personal." Finally, the Civil Rights Act grants to a citizen the right "to full and equal benefit of all laws and proceedings for the security of person and property." This clause covers a great deal of ground and may be construed to include the rest of the opinion of Mr. Washington; that is, "the protection by the government, the enjoyment of life and liberty with the right to acquire and possess

[1] *Cong. Globe, 1st sess. 39th*, p. 2765.
[2] *U. S. v. Wong Kim Ark*, 169 U. S. Reports, 649, 699.

property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole, the right of a citizen of one State to pass through, or to reside in any other State for purposes of trade, agriculture, professional pursuits or otherwise, to claim the benefit of the writ of habeas corpus and the right to 'an exemption from higher taxes or impositions' than are paid by other citizens of the State." Thus it will be seen that the Civil Rights Act contains practically all the essential points of the opinion of Judge Washington. In other words, the Civil Rights Act and the meaning of the terms, privileges or immunities, as expounded by Washington, are about the same thing. They differ from each other only in the extent of their operation. The former nationalizes these privileges or immunities; while the latter simply refers to the existence of such privileges or immunities for a citizen of one State in the several States. History indicates plainly that the adoption of the Fourteenth Amendment was intended to obviate the objection to the Civil Rights Act and secure its permanency. Accordingly, after the adoption of the Amendment, Congress reënacted the Act under the belief that whatever objections to its constitutionality had formerly existed were now removed.[1] Therefore, it may be asserted that the terms, privileges and immunities, employed in the Fourteenth Amendment and the Civil Rights Act are the same thing. Since the contents of the Civil Rights Act "are the same as the privileges or immunities expounded by Judge Washington, the terms employed in the Fourteenth Amendment must be likewise the same. Thus we get the meaning of the terms not from the debates of Congress; but from a law previously established. No court in the world would say that a law previously established is not admissible as evidence to control the meaning of words in a later law intended to cover the same ground. There is, therefore, no sound reason in the light of the law previously established for the majority of the court to maintain that the Fourteenth Amendment does not "control the power of the State governments over the rights of their own citizens."[2]

[1] *16 "Stat. at Large,"* 144.

[2] *Slaughter House* Cases, 16 Wall, 37, 77.

The true meaning of the terms, privileges and immunities employed in the Fourteenth Amendment, whether interpreted by the debates of Congress or by the Civil Rights Act, is entirely destroyed by the decision in the Slaughter House Cases. This decision, therefore, deserves a careful examination. First of all, let us see whether the basis of reasoning in Mr. Justice Miller's opinion is sound. The basis of his reasoning is the conception of citizenship. He holds that an individual derives his citizenship from governments. As the United States has two sets of governments, there are two kinds of citizenship. Should his conception of citizenship be correct, by parity of reasoning, it is not apparent why there may not be more, because there are county and city governments in each State. It may be contended that the municipal government is not the highest political organization and consequently there is no citizenship of it. This is quite true; but the State governments and the United States government are, by no means, the highest political organization. They are liable to be modified, changed, or altered at any moment by the nation. His theory of citizenship is therefore not a true one. Citizenship does not and cannot come from governments; it must and can only come from the sovereign nation. The United States is the sovereign nation, consequently, there is only the United States' citizenship. Mr. Justice Bradley is correct when he says: "Citizenship of the United States is the primary citizenship in this country; and State citizenship is secondary and derivative, depending upon citizenship of the United States."[1] It is apparent, therefore, that the basis of reasoning in Mr. Justice Miller's opinion, is unsound. However, let it be granted, for the sake of the argument, that it is well founded, we may then examine the correctness of his conclusion that there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such. The privileges and immunities of the citizen of the State are, according to him, those fundamental rights enumerated by Judge Washington in the case of Corfield *v.* Coryell,[2] as that de-

[1] Slaughter House Cases, 16 Wall, 37, 112.
[2] 4 Washington's Circuit Court, Rep., 371.

scription "embraces nearly every civil right for the establishment and protection of which organized government is instituted."[1] We have shown that the Civil Rights Act and the Fourteenth Amendment contain all the essential points of Judge Washington's description and that the Civil Rights Act and the Fourteenth Amendment are not State laws. This being true, what ground has Mr. Justice Miller for maintaining the theory that there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to a citizen of the State as such, since all those privileges or immunities that flow from State citizenship have been put under the protection of the general government; first, by the Civil Rights Act and, then, according to our reasoning by the Fourteenth Amendment? In the light of the law previously established and the light of the history of the Fourteenth Amendment, there is no warrantable ground for his theory.

It has been shown so far that the meaning of the terms, privileges and immunities, may be found either in the light of the law previously established or of the debates of Congress. According to the former, the meaning embraces only the description of Judge Washington; while according to the latter, it includes this description as well as the first eight amendments. The next problem concerns itself with the selection of one of these meanings.

In determining this question, the theory of the Constitution of the United States must be taken into consideration. According to this theory, the three departments of government are coördinate and separate. Each department has its own particular function to perform and must remain within the limits defined by the Constitution. The duty of the judicial department is to interpret and observe the will of the framers of the Constitution or the will of the Congress, if constitutional, without any regard to its views as to the wisdom or justice of a particular law. The difficulty of the application of the will to the actual conditions of human society justifies the adoption by the Court of liberal or strict rules of construction, as these conditions may require. The intent,

[1] *Slaughter House Cases*, 16 Wall, 37, 76.

however construed, of the framers of the Constitution or of the legislature, as the case may be, is nevertheless to be respected and must not be nullified. Such intent on the part of the framers of the Fourteenth Amendment, with regard to the meaning of the terms, privileges or immunities, is clearly set forth in the Congressional debates and especially in Mr. Howard's speech. Therefore, from the point of view of political science, the terms, privileges or immunities ought to embrace those privileges or immunities secured by the first eight amendments of the Constitution and those enumerated by Judge Washington. In other words the term ought to cover the entire domain of civil liberty against the States at every point.

CHAPTER V.

Life, Liberty and Property.

The first half of the third clause of the Fourteenth Amendment limits the power of the State in depriving any person of life, or property. By the term life, as interpreted by Mr. Justice Field in Munn *v.* Illinois, "something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision."[1]

Great difficulty is involved in an interpretation of a term so vague as liberty. Montesquieu defines it as "a right of doing whatever the laws permit" and explains his definition by saying that, if a citizen could do what laws forbid, he would no longer be possessed of liberty, because all his fellow-citizens would enjoy the same power.[2] A similar definition is given by Webster who says: "Liberty is the creature of law, essentially different from that authorized licentiousness that trespasses on right. It is a legal and a refined idea, the offspring of high civilization, which the savage never understood and never can understand. Liberty exists in proportion to wholesome restraints; the more restraints on others to keep off from us, the more liberty we have. It is an error to suppose that liberty consists in a paucity of laws. If one wants few laws, let him go to Turkey."[3] A somewhat different definition is given in the Slaughter House Cases by Mr. Justice Swayne who defines liberty as "freedom from all restraints but

[1] 94 U. S. Reports, 113, 142.

[2] "Spirit of the Laws," B. 11, c. 3.

[3] "*Webster's* Works," Vol. II, p. 393.

such as are justly imposed by law."[1] All these definitions are inadequate for legal purposes. The first two are too general and do not go to the heart of the problem because legal restraint, or a right of doing something which the law allows, is not the essence of civil liberty. The whole idea we associate with the term liberty is "that of a domain in which the individual is referred to his own will and upon which government shall neither encroach itself, nor permit encroachments from any other quarter."[2] Mr. Justice Swayne's definition is too vague and entirely fails to give us a legal foundation for the term liberty. It refers to freedom of action in the abstract and not to that action of which the law takes cognizance. Liberty is quite different from freedom of action in the abstract. In means the power of an individual to exercise certain rights, the realization of which may involve the employment of governmental force.

After finding out what liberty is the next question that presents itself for investigation is what are the elements of which the concept liberty in the Fourteenth Amendment is composed? Liberty and slavery are contradictory terms. If one exists, the other must go. The best way, therefore, of discovering the elements of liberty is simply to find out what are the civil incidents that constituted slavery. The Civil Rights Act of 1866 tells us what these incidents are because it "undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form."[3] They are inequality of rights in making and enforcing contracts, suing, being parties to and giving evidence in suits, inheriting, purchasing, leasing, selling, holding, and conveying real and personal property, and enjoying the benefit of all laws and proceedings for the security of person and property; and finally, inequality in the punishments for the commission of the same crime. This description of the incidents of slavery indicates the composition of liberty. Liberty, therefore, means at least equality in those elements of right, if nothing more.

The next term to be explained is property. Property is

[1] Slaughter House Cases, 16 Wall, 36, 112.

[2] Burgess, "Pol. Sci. and Const. Law," Vol. I, p. 174.

[3] *Civil Rights Cases*, 109 U. S. Reports, 22.

defined by the Court as "everything which has an exchangeable value."[1] This definition might be a good one in economics but it is not satisfactory for legal purposes. Is the right to continue the practice of a profession a kind of property? According to this definition, it is not on account of having no exchangeable value; but in law it is property.[2] We know a franchise is not a subject of sale and transfer unless made so by law.[3] Yet a franchise is certainly property,[4] though it is not according to the above definition. Examples of this kind may be multiplied to show the inadequacy of this definition. In law, property has nothing to do with exchangeable value; it is only a legal attribute attached to things. What the laws recognize to be property is property. A fish on the high sea or an animal on the wild plain is not property because the law does not recognize it to be such. A public office is not property or the salary thereof because the Court has so held.[5] Being the legal attribute of a thing, the term property when applied to land comprehends every species of title, inchoate or complete, and embraces rights which lie in contract — those which are executory as well as those which are executed;[6] and when applied to the possessions of a man, includes all products of his labor as well as what he obtains legally. It is not confined to mere tangible property but extends to every species of vested right[7] under the limitation that a vested right is not completed until the possessor has done everything required by law to secure such right.[8]

[1] 16 Wall, 374.
[2] Dent *v.* West Virginia, 129, U. S. 114.
[3] 112 U. S. Reports, 619; 106 U. S. Reports, 484.
[4] West River Bridge Co. *v.* Dix, 6 How., 534.
[5] 178 U. S. Reports, 548.
[6] Soulard *v.* U. S. Reports, 4 Peters, 511.
[7] Champbell *v.* Holt, 115 U. S. Reports, 620.
[8] Champbell *v.* Wade, 132 U. S. Reports, 34.

CHAPTER VI.

Due Process of Law.

According to the third clause of the Fourteenth Amendment, a State may deprive persons of life, liberty, or property by due process of law. This calls for an interpretation of due process of law. Now this phrase may be interpreted, in the first place, in the light of its historical development since its origin in that important provision in Magna Charta which said: "No freeman should be taken or imprisoned or disseized or be outlawed or exiled or anywise destroyed but by the lawful judgment of the peers or by the law of the land."[1] The law of the land and due process of law are equivalent; they were so regarded by Lord Coke[2] and have been so declared by the courts of the United States,[3] and so used in one of the English statutes in which the two phrases appear as synonymous.[4] As they are equivalent terms, they must have the same object, similar means for their realization, and a similar sphere of action. The object of the phrase the law of the land was to place life, liberty and property under the protection of the law and to secure the English people against arbitrary action on the part of the king. The same object must be ascribed to due process of law. At the time of King John, England was an aristocratic state. Sovereignty was assumed by the great barons in union. The government was vested wholly in the crown. As the law of the land limited the king's action, it may be said to have been directed against the government. A like sphere of operation must be allowed to due process of law. It must be considered as operating on every part of the government, executive, legislative, and judicial. The law of the land was to be enforced by the observation of the ancient and customary laws of the English people. Carrying this analogy into the interpretation of the United States Constitution, the norms for the

[1] G. W. Atherton, "Magna Charta," p. 16.
[2] Lord Coke, "Second Institute," p. 50.
[3] 96 U. S. *Reports*, 97.
[4] *37 Eliz., c. 8.*

enforcement of due process of law must be the laws of the several States.

It is in the last point, *i. e.*, the norms for the enforcement of due process of law, that the failure of the historical method of interpretation lies. Can a State make anything it chooses due process of law? To affirm that it can is practically to destroy the value of the Fourteenth Amendment; to deny that it can is simply to declare that what a State legislature makes law may or may not be due process of law. So the whole question remains unsolved.

A further examination of Magna Charta reveals further inadequacy of this method. The law of the land was really intended to be used as an instrument with which to take away the legislative power of the king. If the legislative power of the several States be taken away by this interpretation of the phrase, the American system of governments would be revolutionized. Therefore, the assertion that these terms are equivalent is unsound.

As the first method fails, so does the second — the deduction by which a new premise is drawn from two or more previously asserted. The premises laid down by the Court as to what due process of law means are numerous. In the case of Walker *v.* Sauvinet,[1] the Court states: "Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State." In the case of Pennoyer *v.* Neff,[2] due process of law is interpreted to mean "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." In the case of Davidson *v.* New Orleans,[3] the Court points out the difficulty and impossibility of giving due process of law a definition which would at once be comprehensive and satisfactory and concludes that the annunciation of the principles which govern each case as it arises is the better mode of arriving at a sound definition. In Hurtado *v.* California,[4] Mr. Justice Matthews, after reviewing previous de-

[1] 92 U. S. Reports, 90.
[2] 95 U. S. Reports, 714.
[3] 96 U. S. Reports, 97.
[4] 110 U. S. Reports, 516.

clarations, says: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good which regards and preserves these principles of liberty and justice, must be held to be due process of law." In Harper *v.* Reclamation District,[1] it is held that due process of law means "one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." In Leeper *v.* Texas,[2] Chief Justice Fuller says: "that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied." The Court in the case of Holden *v.* Hardy[3] says: "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

All these statements testify that the judges have different opinions in regard to the essence of due process of law. Some of them hold it to mean the procedure according to State laws; others define it as those rules and principles which inhere in the jurisprudence or the very idea of free government; one judge defines it as any legal proceeding which regards and preserves the principles of liberty and justice; another, as the principles which govern each case as it arises. This diversity of opinion among learned judges indicates that due process of law is one of the constitutional phrases requiring construction. Can all these statements be used as premises from which to deduce a new one? Our answer must be negative; for we have almost as many different statements as we have law cases and it is impossible for us to say which is the correct interpretation. Thus it will be seen that the method of deduction also fails.

[1] 111 U. S. Reports, 707.
[2] 139 U. S. Reports, 462.
[3] 169 U. S. Reports, 366.

The best way out of the difficulty seems to be to admit that there is such a principle as due process of law. Without knowing exactly what it is, we simply ascertain its relations to the deprivation of life, liberty, or property by a State; just as electricians, without knowing accurately what electricity is, have by experiments worked with it in manifold applications.

Criminal Cases.— The leading case in due process of law in criminal matters is Hurtado *v.* California.[1] The question here was the constitutionality of the provision authorizing prosecutions for felonies by information, after examination and commitment, without indictment by a grand jury. Hurtado was charged in an information with the crime of murder, and, without any investigation of the case by a grand jury, was tried, found guilty and condemned to death. The Supreme Court of the United States in affirming the judgment of the California Supreme Court, said: "We are to construe this phrase — due process of law — in the Fourteenth Amendment by the usus loquendi of the Constitution itself. The same words are contained in the Fifth Amendment which makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crime under the law of the United States. It declares that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property without due process of law.' According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important Amendment is superfluous. The natural and obvious inference is, that in the sense of the constitution, 'due process to law' was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the act of the State, it was used in the same sense and with no greater extent; and that, if in the adoption of that Amendment, it had

[1] *110 U. S. Reports*, 516.

been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declaration to that effect. Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to the law of the land in each State, which derives its authority from the inherent and reserved power of the State, exerted within the limits of these fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." In conclusion, the Court said: "Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice must be held to be due process of law."

The whole ground upon which this decision is based is that due process of law in the Fifth Amendment is quite a different thing from that in the Fourteenth, because the latter does not embody the grand jury process, and, therefore, any proceeding in criminal matters authorized by the legislature of a State may be due process of law. It is undoubtedly true that due process of law in the Fifth and Fourteenth Amendments has different implications; but it is not true that because the latter does not specify the jury trial, due process was not intended to include the institution of the grand jury. The Fifth Amendment prohibits the taking of private property for other than public use and without just compensation. The Fourteenth Amendment does not expressly mention such prohibition; yet the Court holds that due process of law in that Amendment prohibits such seizure without just compensation[1] and for private use.[2] Thus due process for the exercise of

[1] 164 U. S. Reports, 403.
[2] *166 U. S. Reports*, 226.

eminent domain was intended to include public use and just compensation. Nor does the Court maintain that, because the Fifth Amendment embodies this prohibition, due process of law in the Fourteenth must include it. Due process of law *per se* has its own meaning which may or may not include the express directions in the Fifth Amendment. One is, therefore, not warranted in saying that, because the Fifth Amendment contains such express directions in detail, the Fourteenth Amendment cannot involve the same simply because of the absence of such express declaration.

This opinion may be criticised on another ground. The rule of interpretation of the Constitution of the United States is to follow the principles of the common law. This rule came into existence with Chief Justice Marshall. At the common law, all persons accused of criminal conduct must be indicted by grand jury and tried by petty jury. Blackstone says: "But to find a bill there must be at least twelve of the jury agreed, for, so tender is the law of England of the lives of the subject that no man can be convicted at the suit of the king, of any capital offence, unless by an unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation and afterwards by the whole petty jury, of twelve more, finding him guilty upon his trial."[1] Such is the common law. Had the Court applied the correct rule of interpretation to due process of law in criminal accusations, the case of Hurtado *v.* California would have been decided otherwise. No reason for departing from this rule was assigned by the Court except that a State has the right to change the common law at will. Undoubtedly, a State may alter the common law, but a State has no right to change that part of the common law which the Constitution has declared to be the supreme law of the land; that is, that part of the common law which the Court uses in interpreting the Constitution.

In the case of Hawaii *v.* Mankichi,[2] the Court said: "we would even go further, and say that most, if not all, the privileges and

[1] *4 Bl. Com., 306.*
[2] *190 U. S. Reports.*

immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation, but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practise have shown to be suited to the conditions of the Hawaiian island and well calculated to conserve the rights of their citizens to their lives, their property and their well-being." Thus it will be seen that the Court holds that the jury process is a matter of judicial procedure and not a fundamental right. The abolition of courts and the creation of new ones, leaving all substantial protections with which the existing law surrounds persons accused of crime, has been declared to be a pure matter of procedure.[1] A change in the method of inflicting the penalty of death, from hanging to electrocution, has also been held to be a matter of procedure.[2] A careful examination of these two cases reveals the fact that they did not deprive an individual accused of crime of any substantial protection of the law. Jury trial, however, is not a mere matter of procedure. The jury is an institution designed to procure impartial judgment of criminal conduct. The number of jurors is, therefore, a substantial element. Certainly no one is justified in saying that a trial by two jurors affords the same security as a trial with twelve; yet, according to the theory advanced by the Court in the case of Hawaii *v.* Mankichi, the jury process may be abolished altogether and all criminal cases may be tried by a single judge.

Civil Cases. — The case of Walker *v.* Sauvinet[3] settles the question of due process of law in civil matters. In this case, the plaintiff alleged that he had the constitutional right to a trial by jury and that the statute under which he was tried was void to the extent that it deprived him of that right. The Court held that the statute was constitutional and said: "The States, so far as this (Fifth) amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts, is not, therefore, a priv-

[1] Duncan *v.* Missouri, 152 U. S. Reports, 377.

[2] In *re Kemmler, 136 U. S.* Reports, 436.

[3] *92 U. S. Reports, 90.*

ilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State."

Conclusion.—The conclusions at which one must arrive from a consideration of the cases is that the tendency of the Supreme Court is to regard almost every statute passed by the State legislature and administered regularly by State Courts as constitutional. The Court has held it to be due process of law for a State to repeal a statute of limitation on personal debts, although the right of action is already barred;[1] or to pass statutes giving jurisdiction to courts of equity to entertain a suit brought by the owner of an equitable interest in land to establish his right against the legal owner, although it deprives the owner of a right to a trial by jury, which he would have in a suit at law.[2] States may lawfully make railroad companies liable for all damages to employees even when caused by fellow workmen.[3] Again, a trial in quo warranto proceedings without a jury has been held to be due process of law;[4] likewise a trial and sentence by a judge *de facto* of a court *de jure*;[5] and also a dismissal of a writ of error in respect to a person who had escaped from justice and failed to return in the time prescribed by law.[6] Finally, it is due process of law to remedy the defects of proceedings by a bill in chancery invalidating a judgment for tort committed under military authority;[7] and to confer upon an accused person the right to waive a trial by jury and to elect trial by the court having jurisdiction.[8] However it is not due process for a State, by virtue of any statute, to take jurisdiction through its courts, in order to enforce a mere

[1] 115 U. S. Reports, 620.
[2] 121 U. S. Reports, 282.
[3] *127 U. S. Reports*, 134.
[4] *169 U. S. Reports*, 586.
[5] 139 U. S. Reports, 450.
[6] 166 U. S. Reports, 138.
[7] 131 U. S. Reports, 405.
[8] 146 U. S. Reports, 314.

personal liability against a non-resident not served with process within the State.[1]

Eminent Domain. — Eminent domain means the right of a government to take property for public use. Judged by its nature, this power would seem to have no other limitations than the wisdom of the legislatures of the several States. But due process of law allows no exemption whatever in the exercise of this right, and the precise limitations of that power must be understood. It is well known that public use and just compensation for property taken are the essential elements of due process of law for the Federal government. Do the same limitations run against State governments in exercising this power? This is very doubtful according to the opinion of Mr. Justice Miller in the case of Davidson *v.* New Orleans:[2] "It (a statute) may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Fifth Amendment with the one we are construing, was left out and this was taken." According to the opinion of Mr. Justice Field in the case of Boom Company *v.* Patterson,[3] public use and just compensation are not the essential elements of due process of law. He denied strenuously that the United States government could, under the clause of due process of law, interfere with the exercise by the State of her right of eminent domain; and he said: "The position of the company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments . . . so far as the act of appropriating the property is concerned."

This dictum was afterwards overridden by the irrigation cases in which the Court said: "We do not assume that these various

[1] 95 U. S. Reports, 714.
[2] 96 U. S. Reports, 97.
[3] *98 U. S. Reports,* 403.

statements, constitutional and legislative, together with the decisions of the State court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution and we must decide them in accordance with our views of Constitutional law."[1] It is this case that opens the way for the Court to declare what is the composition of due process of law when applied to the exercise of the power of eminent domain by a State. In the case of Missouri Pacific Railway *v.* Nebraska,[2] public use is decided to be one of the elements of due process of law. This case involved a writ of error to review a judgment of the court of Nebraska, awarding a writ of mandamus to compel the railroad company to comply with an order of the State Board of Transportation for the erection of a third elevator at station Elmwood. The railway company had permitted two elevators to be erected and operated by private firms on the side track at that station. The State Board found the two existing elevators to be very inadequate and thereupon ordered the railway company within ten days to grant to other private persons the privilege of erecting elevators on the same terms and conditions as had been granted to the owners of those already existing. The Federal Court in this instance held that the taking of private property of the railway company for a private use of another was not due process of law.

In the case of Chicago, Burlington Railway Company *v.* Chicago,[3] the Court not only affirmed the decision of the former case, but also declared that just compensation was another element of due process of law. Mr. Justice Harlan said: "If, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law is applicable to the direct appropriation by the State to public use

[1] Fallbrooks *v.* Bradley, 164 U. S. Reports, 112, 159.
[2] 164 U. S. Reports, 403.
[3] *166 U. S. Reports*, 226.

and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use; but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property should not be taken for public use without just compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."[1]

It is apparent that this case not only held just compensation to be necessary but that even the means, the legal procedure offered by the State to attain this end must be satisfactory. This opens the question as to what is satisfactory legal procedure in fixing compensation. This problem is touched but not fully solved by the opinions in the cases of Cherokee Nation *v.* Southern Kansas Railway[2] and Sweet *v.* Rechel.[3] In these cases, it was decided that it is due process of law for a State to take possession of property prior to the final determination of the amount of compensation, if adequate provision therefor has been made. This question is also only partially answered by the decision in the case of Bauman *v.* Ross[4] which laid down the principle that just compensation need not be determined by a jury but that the determination may be entrusted to commissioners. Additional light is thrown on the problem by the case of Long Island Water Company *v.* Brooklyn[5] in which it was held that there is no denial of due process of law in making the findings of commissioners final as to the facts and leaving open to the courts to

[1] 166 U. S. Reports, 226, 236.
[2] 135 U. S. Reports, 64.
[3] 159 U. S. Reports, 380.
[4] 167 U. S. Reports, 549.
[5] *166 U. S. Reports, 685.*

inquire whether there is any erroneous basis adopted by them in their appraisal or other errors in their proceedings. This question was finally answered fully in the comprehensive case of Backus *v.* Fort Street Union Depot Company.[1] In this case, the counsel maintained that the respondents were entitled to a trial by jury of inquest but were forced to a trial before a common law jury, presided over and controlled by the circuit judge. The Court said: "The Constitution of the United States does not forbid a trial of the question of the amount of compensation before an ordinary common law jury, or require, on the other hand, that it must be before such a jury. It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way before some properly constituted tribunal, inquiry shall be made into the amount of compensation, and when this has been provided, there is that due process of law which is required by the Federal Constitution."[2]

Taxation. — The power of taxation possessed by a State is so vast in its character and far-reaching in its extent that it may be asked whether the United States judiciary would review and correct a taxing statute on the ground of due process of law. In order to answer this, we have to examine the relation of due process of law to the different phases of the exercise of the taxing power. The taxing power of a State may be divided into three kinds, namely, the power of choosing what should be taxed, of determining how the tax should be levied and the rate thereof and of fixing the incidents of taxation. The selection of the objects of taxation is regarded by the court as a matter of pure legislative discretion provided a State exercises its power within its own jurisdiction,[3] does not destroy the instrumentalities[4] of the

[1] 169 U. S. Reports, 557.
[2] 169 U. S. Reports, 557, 569.
[3] *15 Wall, 300.* *188* U. S. Reports, 385. 173 U. S. Reports, 193.
[4] *4 Wheaton, 316.* 2 Wallace, 200.

United States government, and does not act contrary to the United States Constitution.[1] The legislature of a State may tax property in its natural condition or in its manufactured form or in its transmutation; such as land tax or general property tax. It may tax any one in his professional capacity as a person, or in his various transactions; such as license tax, poll tax, or inheritance tax. It may impose upon corporations a franchise tax based upon capital employed within the State [2] or a tax according to unit rule.[3] It may exempt certain classes of property from taxation; such as the property of charitable or public institutions or churches.

The decisions indicate that the Supreme Court does not attempt to control under color of due process of law the power of the legislature of a State to choose what should be taxed; but follows strictly the dictum of the case of McCulloch *v.* Maryland.[4] This dictum is: "In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government connot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse."

With regard to the power of the State to determine the methods of levying taxes, the Court applies different rules to different kinds of taxes. There are some methods in which notice and opportunity to be heard are essential to due process of law; and others in which they are not. The following are examples of the latter: poll, license and corporation taxes; specific taxes on things, persons or corporations; assessments for local improvement and public work,[5] or the imposition of the cost of paving upon abutting property according to frontage or acreage.[6] When

[1] Sect. 10, Art. I., U. S. Const.; 12 Wallace, 204.
[2] 171 U. S. Reports, 658.
[3] 165 U. S. Reports, 194.
[4] 17 U. S. Reports, 316.
[5] *149 U. S. Reports, 30.*
[6] *181 U. S. Reports.*

the amounts of these kinds of taxes are fixed by the legislature, that is the end of the whole matter. Notice and opportunity to be heard are not required because there is no need of an inquiry by way of evidence as to the amount of tax to be collected from the tax payers. Furthermore, opportunity to be heard upon the whole amount of assessment is not necessary.[1] On the other hand, if a tax be assessed according to valuation, notice to the owner and a hearing of complaints are necessary, so as to give him a chance to raise all pertinent questions and dispute his liability. Personal notice, however, is held not "an essential to due process of law in respect to taxation."[2] Notice by statute is generally the only kind given and has been held sufficient[3] and even constructive notice by publication is regarded as constitutional.[4]

As to the incidents of the taxing power, it has been decided to be due process of law for a State to declare land forfeited because of non-entry for taxation upon due notice of the proceeding to the owner who may intervene by petition and secure redemption ;[5] to hold valid tax-deeds after having been on record some time ; and to admit them as conclusive evidence of regularity in the assessment of the tax[6] in any action brought more than a prescribed length of time after the recording of the deed and the taking effect of the act. A State may also hold a tax-deed as *prima facie* evidence of the truth of its recitals,[7] and may impose conditions upon foreign corporations seeking to do business within its jurisdiction.[8] But it is not due process for a State to enact a statute authorizing an assessment upon real estate for a local improvement, and imposing upon its owner, a non-resident of the State, a personal liability to pay such assessment.[9]

Police Powers.—Due process of law is held by the Court in the

[1] 125 U. S. Reports, 345.
[2] 167 U. S. Reports, 461, 466.
[3] 115 U. S. Reports, 321.
[4] 140 U. S. Reports, 316 ; 149 U. S. Reports, 30.
[5] 171 U. S. Reports, 404.
[6] 168 U. S. Reports, 90.
[7] 178 U. S. Reports, 51.
[8] *177 U. S. Reports*, 28.
[9] *173 U. S. Reports*, 194.

case of Barbier *v.* Connolly[1] as not designed to interfere with the police power of the State, the power "to prescribe regulations, to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperty." Upon this ground, it has been declared as a valid exercise of police power for a State law to require a practitioner of medicine to obtain from a medical college a certificate;[2] a railroad company may be compelled to erect and maintain fences and cattle guards on the sides of its roads under a penalty of additional damage;[3] a railroad company may be held liable for all damages to any employee in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees.[4] Under its police power a State may authorize the recovery of double the value of the stock killed or damaged by a railroad when the injury takes place at a point on the road where the corporation is bound to erect a fence and has failed to do so, and when it is not occasioned by the wilful act of the owner or his agents;[5] it may prescribe limits within which no woman of lewd character shall dwell;[6] or make water rent due a municipality a charge upon lands with a lien having priority over all liens by mortgage;[7] or declare void all contracts for the sales of shares of the capital stock of any association on margin;[8] or require a permit from the mayor from any one wanting to make a public address upon or in any of the public grounds;[9] or fix a maximum rate for railroads[10] provided the rate is not so unreasonably low as to deprive the carrier of its property.[11] Cases of a similar character might be greatly multiplied.

In Beer Company *v.* Massachussetts,[12] the court said: "If the public safety or the public morals requires the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental

[1] 113 U. S. Reports, 27.
[2] 129 U. S. Reports, 114.
[3] 115 U. S. Reports, 512.
[4] 127 U. S. Reports, 205.
[5] 129 U. S. Reports, 29.
[6] 177 *U. S. Reports*, 587.
[7] 113 U. S. Reports, 506.
[8] 187 U. S. Reports, 606.
[9] 177 U. S. Reports, 587.
[10] 125 U. S. Reports, 680.
[11] 169 U. S. Reports, 466.
[12] 97 U. S. Reports, 32.

inconvenience which individuals or corporations may suffer." So the mere fact of pecuniary injury resulting to one from a prohibition by the legislature does not sufficiently establish his ground of claiming that due process of law is violated. The Court, has upon this principle, upheld a State law prohibiting the sale or manufacture of intoxicating liquors in buildings long before constructed for the purpose.[1] It has also decided that a State may forbid the sale of oleomargarine lawfully manufactured before the passage of the statute;[2] or prevent the continuance of a plan for converting dead animals into an agricultural fertilizer although it was lawfully established before.[3] So also the injury resulting from the destruction of property which is itself a public nuisance is not a violation of the due process of law clause. This is so decided in the case of Mugler *v.* Kansas.[4] The extent of the limit to which property may be destroyed without compensation is, according to the decision of Lawton *v.* Steele, as follows: "If the property," said the Court, in speaking of the nets, "were of great value, as, for instance, if it were a vessel employed for smuggling or illegal purpose, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. Where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement."[5]

The power of determining what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety is lodged with the State and subject to revision by the United States judiciary. The Court has said: "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished by those of a particular class, require such

[1] 123 U. S. Reports, 623, 663.
[2] 127 U. S. Reports, 678, 683, 687.
[3] 97 U. S. Reports, 659.
[4] 123 U. S. Reports, 623.
[5] *152 U. S. Reports*, 133, 141.

interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, the determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."[1]

[1] 152 U. S. Reports, 133, 137.

CHAPTER VII.

Equal Protection of the Law.

The equal protection clause of the Constitution sounds simple and clear and would not, on the surface, seem to call for much attention; but when it comes to the application of the principle to the actual condition of persons in human society — a condition full of varieties of circumstances, situations, and relations — it is evidently impossible to secure to all persons, artificial as well as natural, the benefit of the same laws and the same remedies. Nor would it be sound policy to prohibit the establishment of one system of courts for cities and another for rural districts, the diversities of laws and judicial proceedings in different parts of the same State and the inequality in jurisdiction of the several courts as to territorial extent, subject-matter, amount, and the finality and effect of decisions. Nor would it be reasonable to assert that all corporations, whether public or private, are equally entitled to protection by the same law and subject to the same treatment. Speaking more specifically, it would be irrational to subject a murderer and a thief to the same punishment, or to clothe a man and a corporation with equal rights. Tested by common sense, the provision that no State "shall deny to any person within its jurisdiction the equal protection of the laws" would not and could not mean that all persons, artificial or natural, are equally entitled to the protection of a system of laws which imposes the same duties and confers the same rights upon every person irrespective of circumstances; otherwise the very spirit of the equal protection clause would be destroyed.

One must turn, therefore, to the decisions of the Court for an interpretation of the phrase "equal protection of the laws." According to the case of Hayes *v.* Missouri:[1] "It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike

[1] 120 U. S. Reports, 68.

under all circumstances and conditions, both in the privileges conferred and the liabilities imposed." According to the Kentucky Railroad Tax cases, it "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances."[1] Similar citations could be multiplied; but the general principle remains about the same. Equal protection of the laws is nothing more than uniformity of operation of the laws within classes. Within the same class, all persons should be equally entitled to pursue their happiness and acquire and enjoy property; should have like access to the courts for the protection of their life, liberty, or property, the prevention and redress of wrong, and the enforcement of privileges; and should have no greater burdens than those laid upon others under like conditions and should undergo no severer punishment than such as is prescribed to all for like offences. Racial or economic differences should not affect these things. Classification is, therefore, not only unprohibited but has been recognized as essential to the equal protection of the laws. Classification may be used to secure the equal protection of the laws or it may be used to destroy it. Therefore, the character and limits of classification are important questions for the learned judges of the United States to consider. Mr. Justice Brewer in the case of the Gulf, Colorado and Sante Fe Railway *v.* Ellis,[2] attempts to solve the questions by laying down the rule that a classification must have been based "upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification."[3]

In order to know what is the precise application of the rule of reasonableness in classification, one must go to the decisions of the various cases that come under the purview of the equal protection of the laws. According to the court, "In the administration of criminal justice, the Fourteenth Amendment requires that no different or higher punishment shall be imposed on one than is imposed on all for like offence."[4] The phrase, 'like offence,' implies

[1] 115 U. S. Reports, 321, 337.
[2] 165 U. S. Reports, 150.
[3] 165 U. S. Reports, 150, 165.
[4] 137 U. S. Reports, 624, 632.

the principle that a classification which is based upon a difference in offence is a reasonable one. This principle is again enunciated in the case of Moore *v.* Missouri.[1] In this case, a provision of the Revised Statutes of Missouri which provides that prisoners convicted two or more times of committing offences punishable by imprisonment in the penitentiary should be punished with increased severity for the later offences, was alleged to be in conflict with the equal protection of the laws. Mr. Justice Fuller, who delivered the opinion to the Court, said: "The State may undoubtedly provide that persons who have been convicted of crimes may suffer severer punishment for subsequent offences than for a first offence against the law, and that a different punishment for the same offence may be inflicted under particular circumstances."[2]

Thus it is apparent that the Court holds the principle that a classification of offences based upon offences *per se* is reasonable. This is also true of a classification of offences based in a certain sense, upon a difference in color or race. Such is the opinion held in the case of Pace *v.* Alabama[3] in which the legislature of Alabama passed a law prohibiting a white and a black from living with each other in adultery and imposing upon the parties a greater punishment than they would be subject to were they of the same race or color. The Court held this to be a true classification.

In the classification of the offences above referred to, punishments are dealt out alike to all who are similarly situated. However, where, according to any classification, there is a disparity in the punishment meted out to persons similarly situated and committing the same offence, the Court does not hesitate to declare such a classification unreasonable and void. This was so determined in the case of Strauder *v.* West Virginia[4] with reference to a classification based upon race or color. In this case, the law of West Virginia which provided that no colored man was eligible to be a member of the grand jury or to serve on the petty jury in the State, while whites were so eligible, was attacked on the

[1] 159 U. S. Reports, 673.
[2] 159 U. S. Reports, 673, 678.
[3] *106 U. S. Reports*, 583.
[4] *100 U. S. Reports*, 303.

ground that this law singled out colored persons and denied to them the right and privilege of participating in the administration of the law, as jurors, because of their color, though they were well qualified in other respects. "It is not easy," said Mr. Justice Strong, "to comprehend how it can be said that while every white man is entitled to a trial by jury selected from persons of his own race or color, or rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudices, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects is not a denial to him of equal protection? We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing, make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons with certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color."[1]

The general line of decisions of this class of cases seems to hold that the test of reasonableness of a classification in criminal matters is not the basis of a classification; but that its results furnish the test. If a classification affects alike all who are similarly situated, it is reasonable and consequently constitutional. If a classification operates unequally on all who are similarly situated, it is unreasonable and void.

We find the same test of the reasonableness of a classification in questions of public enjoyment as in criminal matters. In the case of Claybrook *v.* Owensboro,[2] a statute, which, while taxing whites and blacks alike, directed that only the money collected

[1] 100 U. S. Reports, 303, 309.
[2] *16 Fed. Rep., 297.*

from the blacks should be used to sustain their schools, the whites thereby enjoying superior school facilities, was declared unconstitutional and void. Besides this test, there is another one, and that is public policy. This principle is found in the case of Plessy *v.* Ferguson,[1] which involved the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. The first section provided that all railway companies other than street railroad companies carrying passengers should be required to have separate accommodations for whites and blacks. The second section gave power to the officers of the passenger trains to assign each passenger to the coach used for the race to which such passenger belonged. The third section provided penalties for the violation of this act. The statute was sustained by the Court for the following reason: "In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the Acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislation." On the other hand, the dissenting opinion is just as strong as that of the majority of the Court. Mr. Justice Harlan said: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make any discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be

[1] *163 U. S. Reports*, 537.

so wanting in candor as to assert the contrary." He then continued to argue that if a State could prescribe as a rule of civil conduct that whites and blacks should not travel in the same public conveyance, why may it not so regulate the use of the streets, court rooms, public assemblages, and legislative halls so as to compel white citizens to keep on one side and blacks on the other?

Corporations.— In the case William *v.* Eggleston, five towns had been put into a class by themselves, organized into a single municipal corporation, and separated from other towns in the same State by being subject to different control in respect to highways. This special classification was alleged to be in violation of equal protection of the laws. The court, however, held that this was constitutional because the regulation of a municipal corporation is a matter particularly within the domain of State control. Mr. Justice Brewer said: "A municipal corporation is so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the legislature which may place one part of the State under one municipal organization and another part of the State under an organization of an entirely different character. These are matters of purely local nature, in respect to which the Federal Constitution does not limit the power of the State."[1]

As there is a peculiar doctrine to justify special regulations for municipal corporations, so there is another for foreign corporations. In speaking of the position of such corporations in the system of United States jurisprudence, the Court said: "The recognition of its existence even by other States and the enforcement of its contracts made therein depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests, repugnant to their policy. Having no absolute rights of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think

[1] *170 U. S. Reports*, 304, 310.

proper to impose. They may exclude the foreign corporation entirely; they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote public interest. The whole matter rests in their discretion." [1] The only limitation of this doctrine arises where the corporation is in the employ of the Federal Government or where its business is strictly foreign or interstate commerce.[2] With this exception, there is no other limitation upon the power of the State to exclude a foreign corporation from doing business, or to impose conditions for allowing corporations to do business within its limits. This is so established in Pembina Mining Company *v.* Pennsylvania [3] in which a statute imposing a tax on a corporation for "office license" which the State did not exact from its own corporations and from foreign insurance corporations, was held to be constitutional.

Thus the equal protection clause does not prohibit a State from excluding a foreign corporation or from requiring for its admission such conditions as it chooses. As to domestic corporations, the principle is quite different, although it has reduced the equal protection clause to almost nothing by the theory of classification. In the case, Orient Insurance Company *v.* Daggs,[4] the Court said, "It is not necessary to state the reasoning upon which classification by legislation is based or justified. . . . Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." Thus according to this case, only an arbitrary classification amounts to an unreasonable one. As for the test of arbitrary classification, there seems to be involved a moral rather than a legal principle. This may be proved by the decision of the case of Atchison, Topeka, and Santa Fe R. R. Company *v.* Matthews.[5] This case involved the constitutionality of a Kansas statute imposing as part of the liability of railroads for damages

[1] Paul *v.* Virginia, 8 Wall., 168.
[2] 96 U. S. Reports, 1.
[3] 125 U. S. Reports, 181.
[4] *172 U. S.* Reports, 557.
[5] *174 U. S.* Reports, 96.

by fire a reasonable attorney's fee, which, if the plaintiff should recover, became part of the judgment. Plainly this was a law that put the parties in litigation upon a basis of inequality in the enforcement and defense of rights before the Court. But the majority of the Court upheld its constitutionality on the ground that the Court presumed that the legislature, having full knowledge of the conditions within the State, did not intend to make arbitrary classification. If the statute in question does not make an arbitrary classification, it would be very difficult to discover what one is. What the Kansas legislature actually did was to single out the railroad companies and impose an arbitrary burden upon them which was not imposed upon other litigants under like circumstances.

Taxation.—Soon after the adoption of the Fourteenth Amendment, the Civil Rights Act was reënacted and to the clause that all persons should enjoy the same rights as white citizens, and be subject to like punishment, pains and penalties, it added: "and subject only to like taxes, licenses, and exactions of every kind and to no other." This shows that, in intention, the equal protection of the laws imposes a limitation upon the exercise of the power of taxation possessed by a State. Were this otherwise, the limitation is in the language of the Amendment itself for the Constitution does not say "nor deny to any person within its jurisdiction the equal protection of the laws except by taxation." Thus the power of taxation possessed by a State is undoubtedly controlled by the equal protection of the laws; but there is no general rule as to the methods of control; for the Court says it would be impracticable and unwise to attempt to lay down any principle that would include all cases. They must be decided as they arise. An examination of the tax cases reveals the fact that the imposition of a tax upon the nominal value of bonds instead of upon the actual value, is constitutional. This is equally true of a classification according to amount."

The case which holds the imposition of a tax upon the nominal value of bonds to be constitutional is Bell's Gap Railroad Company *v.* Pennsylvania[1] in which Mr. Justice Bradley, who de-

[1] *134 U. S. Reports, 233.*

livered the opinion of the Court, said: "We do not perceive that the assessment in question trangresses this provision. There is no unjust discrimination against any persons or corporations. . . . The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may if its chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their Constitution."[1] The case which holds a classification by amount is Magoun *v.* Illinois Trust and Savings Bank. In this case, the statute of Illinois classified inheritors and legatees into three groups of near relatives, remote relatives, and strangers, and imposed a different rate of taxation on each class. In the class of strangers, the statute provided that the rate of taxation should be increased as the amount of the legacy passed from one sum to another. The Court said: "If there is inequality, it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. On the other hand, it is claimed that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed; and hence that an inheritance of $10,000 or less pays three per cent., and that one over $10,000 pays not three per cent. on $10,000 but an increased percentage on the $10,000 as well as the excess. It is also said, as we have seen, that, in consequence, one who is given a legacy of $10,000 and one dollar, by the deduction of the tax, receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality

[1] *134 U. S. Reports*, 232 236, 237.

of the Fourteenth Amendment. That rule does not require, as has been shown, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."[1]

The case which maintains the validity of a classification which works inequality in its operation is that of the Merchant's Bank *v.* Pennsylvania[2] in which the Court said: "But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. . . . Again it will be perceived that the inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation. It is common practice in the States to offer a discount for payment before the specified time, and impose penalties for non-payment at such times. This, of course, results in inequality of burden, but it does not invalidate the tax.[3]"

It should be noticed that the other two tax cases above referred to, either impliedly or expressly admit the principle that inequality of burden resulting from the operation of a classification cannot establish its unconstitutionality. So it may be safely said, that although there is no general rule as to how the equal protection of the laws controls classification, there is a general principle that equal protection of the laws does control that kind of classification which works inequality in its operations.

[1] 170 U. S. Reports, 283.
[2] 167 U. S. Reports, 461.
[3] 167 U. S. Reports, 461, 464.

CHAPTER VIII.

Conclusion.

The Fourteenth Amendment was adopted with the purpose of nationalizing the whole domain of civil liberty. It first establishes a national basis for the enjoyment of civil liberty through the clause which reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This clause declares in express terms that citizenship of the United States does not depend upon any local constitution or law of the States respectively, but upon the place of birth or the fact of naturalization, and that a citizen of a State is only a citizen of the United States residing in that State. It then declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The complicated terms, "due process of law," "equal protection of the laws," "privileges or immunities," were designed to be used as instrumentalities for the protection of individual liberty against State action at all points. Lastly, the Amendment declares that: "The Congress shall have power to enforce by appropriate legislation the provisions of this article." This was intended to legalize the national legislation necessary for the filling in of the details of the provisions.

Such is the scope of the Fourteenth Amendment. However, when a case came up before the United States judiciary involving the question of the protection of liberty, the majority of the Court decided that only a part of civil liberty has been nationalized and that the other part remains under State protection. The first clause of the Amendment was held by the Court to be designed to confer primarily citizenship on the negro race, and secondly to give definitions of citizenship of the United States and citizenship *of the State; the* second clause, "no State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States," was intended to protect the privileges or immunities of citizens of the United States as distinguished from those of citizens of the State; and the equal protection of the laws was designed to cover cases arising out of legislative oppression against the negroes as a class.

Thus the extent and nature of the Amendment as mapped out by the Court are entirely different from the intent of its framers. The interesting question now presents itself as to whether the Court of later years is inclined to follow the decision of the Slaughter House Cases or the intention of the framers. Our answer would be that, in its more recent opinions, the Court maintains the views expressed in the decision of the Slaughter House Cases with the tendency of widening rather than narrowing. An examination of the general line of decision shows this to be true.

As to privileges or immunities; in the Slaughter House Cases the Court held that the protection of the privileges or immunities possessed by a citizen of a State, because of his State citizenship, remains with the State. This dictum is the one generally followed. It is accepted by the Court in the case of United States *v.* Cruikshank[1] wherein it is said that the protection of the rights of life and personal liberty within the respective States rests alone with the States. So it is followed again in Minor *v.* Happersett[2] in which the Court holds that the Amendment does not add to the privileges or immunities of a citizen; it simply furnishes an additional guaranty for the protection of such as he already had. *In re* Kemmler,[3] the present Chief Justice says that "The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty, and property rests, primarily, with the State and the Amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State governments

[1] 92 U. S. Reports, 542.
[2] 21 Wallace, 162.
[3] *136 U. S. Reports*, 436, 448.

were created to secure. The privileges and immunities of citizens of the United States, are, indeed, protected by it; but those are privileges and immunities arising out of the nature and essential character of the National Government, and granted or secured by the Constitution of the United States." Finally, in the Case of Maxwell *v.* Dow,[1] the opinion of the Slaughter House cases is once more enunciated. All these cases show that the Court of later years follows the decision of the Slaughter House Cases as far as its main feature is concerned.

As to Cititizenship: The decision of the Slaughter House Cases lays down two dicta; the distinction between citizenship of the United States and citizenship of a State, and the exclusion of the children of ambassadors and foreign envoys and subjects of foreign States born within the United States jurisdiction from the operation of the first clause of the Amendment. The first dictum is still the law of the country, but the second is overridden by the Court in recent cases. The Court now holds all persons who are born in the United States and subject to the jurisdiction thereof at the time of birth to be citizens of the United States without regard to the nationality of their parents. Thus, so far as citizenship is concerned, the Court has widened the scope of the Fourteenth Amendment.

As to equal protection of the laws: Mr. Justice Miller said: "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes reside which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. . . . We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[2] In other words, equal protection of the laws is confined only to cases arising out of legislative oppression against the negroes as a class

[1] *176 U. S. Reports*, 581.
[2] *16 Wall, 81.*

We have seen in the chapter on the equal protection of the laws that there are other cases arising out of State actions than those of discrimination against race or color. This shows that the Court of later years does not restrict the equal protection of the laws to the scope of Mr. Justice Miller's dictum; but attaches to it a much wider sphere of operation.

Mr. Justice Miller does not, in the Slaughter House Cases, say anything definite about due process of law, so that the development of this topic cannot be so clearly made out from the general line of decisions. In the face of the facts above referred to, moreover, it appears evident that the Court of later years maintains the general scope of the Amendment marked out by Mr. Justice Miller, with the tendency of widening rather than narrowing the same.

VITA.

The author was born in Kwangtung, China, and was prepared for college under private tutoring. At the age of seventeen he was admitted to advanced standing in Imperial Tientsin University which was organized on the western plan with a course of eight years study. In his second year in the collegiate department a scholarship for studying in Japan was offered to him by the Viceroy of Pei-Yang, which was declined. Three years later he was sent by the Chinese government to study political science in Columbia University where he has spent three years and taken up courses under Professors Burgess, Moore, Goodnow, Clark, Seligman, Giddings, Munroe Smith and others. He is a fellow in Constitution Law in Columbia University in 1904–5. He has received two degrees from his government and was instructed to continue his studies in Germany and France for the coming year.